No. 93-844

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARVIN L. WARNER,

Petitioner,

v.

REX A. ZENT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1.

(a) Did the Court of Appeals violate *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), by accurately quoting *Bouie* on the standard for evaluating statutory expansion claims?

(b) Was the Court of Appeals correct in holding that the Ohio Supreme Court's interpretation of Ohio criminal laws must be upheld where the interpretation is reasonable and foreseeable?

(c) Did the Petitioner fairly present his constitutional claim to the state courts when he raised it for the first time in a motion for rehearing filed after the Ohio Supreme Court had already issued its decision?

2.

(a) Was the Court of Appeals correct in accepting the Ohio Supreme Court's holding that the Ohio securities laws require a seller to exercise reasonable diligence before making material representations to potential buyers?

(b) Would habeas relief on Petitioner's "presumption of knowledge" claim be appropriate in light of the Ohio Supreme Court's finding that any claimed error would have been harmless beyond a reasonable doubt because the evidence showed the Petitioner to have had actual knowledge, and where the jury specifically found that the Petitioner acted with a purpose to deceive?

3.

(a) Did the Court of Appeals err in failing to cite *Townsend* v. *Sain*, 372 U.S. 293 (1963), when the Petitioner did not assign the denial of an evidentiary hearing as an issue for appeal?

(b) Should the Court of Appeals have ordered an evidentiary hearing where the Petitioner's claim that he did not receive a full and fair state court hearing is based solely upon the exclusion of evidence inadmissible under the Ohio Rules of Evidence, and where the only purpose would be to further consider juror affidavits that the Ohio Supreme Court and the Court of Appeals found not probative on the fact in question?

(c) Is an evidentiary hearing required where, even if Petitioner prevails, he will do not more than prove the existence of harmless error relating to a claim waived for purposes of habeas?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Respondent does not contest the statement of opinions below set forth in the Petition for Writ of Certiorari. For the convenience of the Court, citations to the opinions below will be to the text of those opinions reproduced in the appendix to the Petition For Writ of Certiorari.

JURISDICTION

Respondent does not contest petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent does not contest the recital of constitutional and statutory provisions set forth in the Petition of Writ of Certiorari.

STATEMENT OF THE CASE

This is Marvin Warner's second attempt to obtain Supreme Court review. The first came on direct appeal after the Ohio Supreme Court unanimously reinstated his convicitons in *State* v. *Warner*, 564 N.E.2d 18 (Ohio 1990), *cert. denied*, 499 U.S. 961 (1991). He is now before the Court on the denial of his federal habeas corpus petition. In the meantime, he has completed his prison sentence and been released on probation to his horse farm in Florida.

Warner was convicted for two separate criminal schemes. First, in 1983 he illegally transferred $12.2 million of a savings and loan association's assets to a Florida securities dealer with which he had a personal account, resulting in the loss of those funds when the dealer collapsed two years later. Second, in 1984 he participated in the fraudulent issuance of millions of dollars in worthless debentures.

1. Warner's Unauthorized Acts Offenses

Warner was convicted of six counts of the unauthorized transfer of funds from Home State Savings Bank to ESM Government Securities, Inc., a small, unregulated, and thinly capitalized securities dealer in Ft. Lauderdale, Florida. Warner, Home State's owner and *de facto* chief executive, had introduced Home State to ESM, and was one of the few individuals with a personal — and remarkably profitable — ESM trading account.

The six transfers in question were the last of a series of forty-one "margin calls" that began shortly after Warner personally approved a $700 million transaction with ESM in April 1983. Warner's direct involvement with the margin calls began in August 1983 when he advised Home State's management that *only he* could approve additional margin payments to ESM. The six transfers made thereafter totalled $12.2 million.

The margin payments were in direct violation of a Home State board resolution limiting further transfers to ESM. (Although Warner effectively ran Home State, he was not at that time an officer or board member.) That resolution had been passed in April 1983 at the insistence of Ohio savings and loan regulators and Home State's private insurer, which had become alarmed by the enormous risks Home State was taking in its dealings with ESM.

When ESM collapsed amid allegations of fraud in March 1985, Home State lost $144 million dollars. The loss was directly traceable to the "unsafe and unsound practices" identified by the regulators, and the transfers made to ESM in connection with the $700 million deal approved by Warner. Whereas Home State and its insurer, the Ohio Deposit Guarantee Fund, were destroyed by ESM's failure, Warner closed his personal ESM account at a profit when alerted two months in advance of ESM's collapse.

2. Warner's Securities Violations.

Warner was also convicted of three counts of securities fraud committeed in 1984, when he sold worthless Home State debentures through a false and misleading offering circular. Warner was actively involved in the preparation of the offering circular and the mechanics of the sale. Proper disclosure would have revealed that Home State was insolvent (even disregarding the transactions with ESM), that a significant portion of its assets had been sold to unknown third parties, that ESM had funneled millions to Warner and the bank's president, and that the state regulators had described Home State's investments with ESM as "unsafe and unsound" banking practices. The Ohio Supreme Court concluded, as did the jury which convicted him, that "Warner's actions were shown to be calculated and deceitful." *State* v. *Warner*, 564 N.E.2d at 44.

3. The Indictment and Amended Indictment

Warner and former Home State presidents David Schiebel and Burton Bongard were indicted on December 13, 1985. All were charged with 41 violations of Ohio Rev. Code § 1153.01 for the illegal "margin calls" paid to ESM in 1983. Warner and Schiebel were also charged with three counts of securities fraud for the 1984 debenture offering.

In pretrial motions, Warner argued that the 41 margin call counts were duplicitous because Ohio Rev. Code § 1153.01 "creates at least two offenses, misapplication and the commission of unauthorized acts." He noted that the unauthorized acts offense was "clearly broader" than the willful misapplication offense. The trial court agreed that counts 1 through 41 were duplicitous, but ordered severance rather than election. As amended, the indictment charged Warner with 41 counts of misapplication and 41 counts of unauthorized acts, all of which reflected the language of the original indictment that Warner had acted with "an intent to injure or defraud."

4. The Supplemental Jury Instructions.

The trial lasted three months, with the jury finally instructed on the afternoon of Friday, February 20, 1987. After orally delivering his prepared instructions the judge called counsel to chambers to hear objections and requests for additional instructions. The court then orally delivered three supplemental instructions requested by the defendants and one requested by the State. The jury retired to deliberate late Friday afternoon and was given a black loose-leaf binder containing the judge's written instructions. The binder did not at that point contain the four supplemental instructions.

When the jury reconvened the following morning, two of Warner's attorneys and one Assistant Special Prosecutor met in chambers to determine the status of the written supplemental instructions. Following discussion and agreement between counsel and the court, one of Warner's attorneys

gave the court reporter copies of the supplemental instructions, which she retyped and gave to the trial judge. The trial judge's constable hand-delivered the instructions to the jury while it was on break. Warner did not object to the contents of, or method of delivering, the written supplemental instructions.

On March 2, 1987, after nine days of deliberations, the jury convicted Warner of six counts of unauthorized acts and three counts of securities fraud. (Bongard was convicted on all 82 counts, and Schiebel on only the three securities counts.) Court personnel went to the jury room immediately after the verdict to gather the jury instructions and exhibits. The room was in chaos, with members of the press fishing through exhibits and waste paper baskets. The thousands of pages of exhibits introduced at the trial were eventually gathered together and placed on a cart, which tipped over on the way to the clerk's office, spilling the exhibits to the floor. According to Warner's counsel, who examined the written jury instructions after the trial, the four written supplemental instructions were not among the jury instructions that were delivered to the clerk's office.

5. Post-trial Proceedings.

Warner filed post-trial motions for a new trial and for acquittal on the unauthorized acts counts. Referring in his new trial motion to the court's refusal to give an "intent to injure or defraud" instruction, Warner argued that "[c]onviction on a charge other than that made in the indictment constitutes a denial of due process of law under the constitutions of Ohio and the United States." He did not argue that the statute under which he was indicted failed to give fair notice of the elements of the offense.

Warner also for the first time argued that wire transfers were not covered by the unauthorized acts statute. He had never before questioned the applicability of the law to wire

transfers, despite having been fully aware from the outset that the State's case was based upon transfers over the Fedwire. Even as stated, however, his motion did not include any due process or constitutional fair notice claims. Warner's motions for new trial and for acquittal were denied.

The first time Warner made any statutory fair notice or *ex post facto* law claims was when his state appeals were over, and he filed a motion for rehearing in the Ohio Supreme Court. The motion for rehearing was denied without opinion.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW DID NOT APPLY NEW CONSTITUTIONAL PRINCIPLES WHEN IT QUOTED FROM *BOUIE*, BUT REJECTED PETITIONER'S JUDICIAL ENLARGEMENT ARGUMENT BECAUSE THE OHIO SUPREME COURT'S INTERPRETATION OF ITS LAW WAS REASONABLE AND FORESEEABLE UNDER ESTABLISHED STANDARDS. FURTHERMORE, THE PETITIONER WAIVED THE ISSUE BY FAILING TO FAIRLY PRESENT IT TO THE STATE COURT.

The "new law" Warner claims was applied to his case is nothing more than a quotation the Court of Appeals took — accurately and without modification — from *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Warner lost below because his claim fails the traditional test for statutory expansion cases, not because he was subjected to a new rule of law. Moreover, the court was being solicitous of Warner to even consider the issue, since he waived it during the state proceedings.

A. The Court of Appeals Did Not Establish a New Standard, But Applied Traditional Principles To the Petitioner's Claims.

The Petitioner's argument is that the Court of Appeals violated *Bouie* by quoting from it. The opinion below quotes *Bouie's* holding that retroactive effect cannot be given to a statutory interpretation if it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." 378 U.S. at 354. (Pet. App. B-22.) *Bouie* phrases the test slightly differently in other parts of the opinion. Warner asserts that the other phrasings are authoritative and that this one is not. Hence Warner accuses the Court of Appeals of making "new law" through the "*addition* of a requirement that the state decision be 'indefensible,' as well as

unforseeable." *Petition* at 13-14 (emphasis added).[1] This may be the first time a court has been accused of making new law merely because it quoted from the controlling Supreme Court authority.

Warner is making a distinction without a difference. The challenged language is just another way of saying what is said elsewhere in *Bouie*. For instance, in the very next paragraph, the *Bouie* opinion uses the phrase "unforseeable and unsupported" instead of "unexpected and indefensible." 378 U.S. at 354. Neither phrase marks a departure from *Bouie's* central holding. Indeed, it is difficult to see how the word "indefensible" either adds or detracts from the foreseeability standard. This Court obviously thought that the inclusion of the word created no inconsistency.

Warner ignores, of course, the other parts of the Court of Appeals' opinion discussing in greater detail foreseeability as the test for judicial expansion claims. (*E.g.*, Pet. App. B-17-18.) Warner lost below not because he failed to satisfy a new test, but because the state court interpretations were found to be reasonable and foreseeable. His claim that the Court of Appeals created a new standard by quoting established Supreme Court precedent is frivolous.

B. The Ohio Supreme Court's Interpretations of State Law Were Reasonable and Foreseeable.

1. The Ohio Criminal Code has long supplied a recklessness *mens rea* for unauthorized acts.

As Warner pointed out in pretrial motions, Ohio Rev. Code § 1153.01, under which he was indicted, "creates at least two

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[1] Warner also claims that the quotation "is not precisely accurate" because the language originally came from a hornbook. *Petition* at 13. Warner never explains why a holding of this Court should be any less authoritative merely because it endorses the remarks of a legal scholar.

offenses, misapplication and the commission of unauthorized acts." Warner argued that the "unauthorized acts clearly are broader" than misapplication. The statute sets out a "willfully" *mens rea* for misapplications, but is silent on the *mens rea* for unauthorized acts. No Ohio court had ever passed on the *mens rea* for unauthorized acts, although several cases had imposed an intent standard for the misapplication offense. The Ohio Criminal Code provides: "When the section defining an offense . . . neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." Ohio Rev. Code § 2901.21(B). Accordingly, the Ohio Supreme Court held that the *mens rea* for the unauthorized acts offense was recklessness.

As the Court of Appeals observed, Warner cannot claim that he was fooled by the presence of the "willfully" *mens rea* for the misapplication offense, for Warner himself pointed out that Ohio Rev. Code 1153.01 contained two distinct offenses. Nor can the application of § 2901.21(B) to the unauthorized acts offense be reasonably questioned. The statute had been in place and was applied long before Warner committed his crimes — *see, e.g.*, *State* v. *Adams*, 404 N.E.2d 144 (Ohio 1980) (recklessness *mens rea* applied to lesser included offense) — and its application has even been acknowledged by this Court. *Osborne* v. *Ohio*, 495 U.S. 103, 112 n.9 (1990).

As the Court of Appeals held, it is both reasonable and foreseeable that a state court would apply a recklessness *mens rea* to an unauthorized act offense when the Criminal Code requires that it do so.

2. It was foreseeable and reasonable that a wire transfer would be encompassed within the term "draft" under Ohio law.

The Court of Appeals put it best:

> We simply cannot accept the notion that although someone in Mr. Warner's position could reasonably have understood that it would be against the law to send ESM unauthorized drafts for $12.2 million if the drafts were written on paper, he could not reasonably have understood that it would be against the law to transmit unauthorized drafts for $12.2 million if the drafts were in paperless form.

(Pet. App. B-24.)

Warner's argument is that he should be rewarded by modern technology — that crimes plainly contemplated by the legislature should escape punishment because the means of commission have become more advanced. This Court has never endorsed that view.

> Old crimes . . . may be committed under new conditions. Old laws apply to changed situations. The reach of [an] act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope.

Browder v. *United States*, 312 U.S. 335, 339-340 (1941) (footnotes omitted). Thus, for instance, this Court reinstated a conviction in which phonograph records were for the first time held covered by obscenity laws that specifically referred only to printed matter, pictures, and films. *United States* v. *Alpers*, 338 U.S. 680 (1950). To hold otherwise would, as the Court observed, "defeat the obvious purpose of the legislation." The same is true here.

The Ohio Supreme Court's interpretation of the statute was entirely consistent with prior authority and the realities of modern banking practices. *See, e.g., Richards* v. *Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989) ("check" includes wire transfers); *Illinois, ex rel. Lignoul* v. *Continental Ill. Nat'l Bank & Trust*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976) (electronic transfers equivalent to issuance of check); 31 C.F.R. § 103.11(p) (giving equal effect to transfers by wire or by "other written order"). As the Court of Appeals observed, "[it] was by no means unforeseeable" that the Ohio Supreme Court would interpret the statute as it did. (Pet. App. B. 23.)

C. Petitioner Waived The Statutory Enlargement Claims By Failing to Timely Present Them To the State Court.

The District Court below ruled that Warner had waived both branches of his statutory enlargement argument. The Court of Appeals did not address the waiver issue, finding it easier to dispose of Warner's claims on the merits. (Pet. App. B-19) That may be true, but it makes little sense to grant certiorari on claims that have been waived.

Despite every opportunity and incentive to raise a fair notice of *ex post facto* claim before and during the trial, Warner did not do so. His only constitutional claim in post-trial motions was that "[c]onviction on a charge other than that made by the indictment constitutes a denial of due process of law under the Constitutions of Ohio and the United States." His argument concerned only the *mens rea* issue, and was based upon the "intent to injury or defraud" language in the indictment. He did not contend that the statute itself failed to give fair notice.

In the Ohio Court of Appeals and Supreme Court, Warner once again based his argument on the contention that the jury instructions varied from the indictment. He argued that the

recklessness instruction was wrong as a matter of state law and that the *indictment* gave insufficient notice, but he did not argue that the *statute* gave insufficient notice. The first time Warner ever claimed that the recklessness instruction had the effect of an *ex post facto* law was in his Motion for Rehearing in the Ohio Supreme Court—by which time it was too late.

Likewise, Warner repeatedly waived the due process argument regarding wire transfers. Warner had known since long before trial that the unauthorized acts charges were predicated on wire transfers. In post-trail motions, he for the first time argued that wire transfers were not convered by the unauthorized act statute, but from that point through his later state court appeals he limited his argument to questions of state law interpretation, omitting any constitutional challenge. As with his due process claim regarding the *mens rea*, Warner first raised the constitutional claim regarding wire transfers in his motion for rehearing filed after the Ohio Supreme Court issued its opinion.

Constitutional claims must be fairly presented to the state court before they may be raised in a habeas petition. *Picard* v. *Connor*, 404 U.S. 270 (1972). A motion for rehearing, however, is not a fair presentation. "The [Ohio] Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court." *State* v. *Williams*, 364 N.E.2d 1364 (Ohio 1977), *vacated in part on unrelated grounds*, 438 U.S. 911 (1978) (syllabus 2). *Accord State* v. *Awan*, 489 N.E.2d 277 (Ohio 1986). The motion for rehearing did not cure the waiver. "A rehearing will not be allowed [in the Supreme Court] merely for the purpose of assigning errors not assigned upon the original hearing." *City of Cincinnati* v. *Cameron*, 33 Ohio St. 336 (1878) (syllabus 7). Warner's motion for rehearing was thus not a "fair presentation" of the claim he attempts to raise here. *Cf. Castille* v. *Peoples*, 489 U.S. 346 (1989) (raising issue for first time in

petition for allocature to state supreme court is not fair presentation).[2]

Warner had ample opportunity to raise judicial expansion claims, but he did so only when it became obvious that he would need constitutional issues for a federal habeas petition. By that time, it was too late to fairly present his claims to the state court. As the Court of Appeals demonstrated, it may be easier to dispose of Warner's claims on the merits than to examine the record of his waiver, but that is hardly a justification for granting certiorari.

II. *SANDSTROM v. MONTANA* DOES NOT PROHIBIT A STATE FROM DEFINING THE ELEMENTS OF CRIMINAL OFFENSES, NOR DOES IT REQUIRE ACQUITTAL WHERE ALLEGED ERROR WOULD BE HARMLESS BEYOND A REASONABLE DOUBT.

A. Ohio's Interpretation of Its Statutes As Requiring the Use of Due Diligence In the Issuance of Securities Does Not Violate *Sandstrom*.

Warner urges the Court to accept certiorari to overturn a state court's interpretation of its own criminal statute. Were the Court to do so, it would radically change the rights of

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[2] Warner's contention that the Ohio Supreme Court must be deemed to have reached the merits of his claim on rehearing is frivolous. The denial of a hearing is in no sense a ruling on the merits—if anything, it is an explicit refusal to further consider the merits.

Nor did Warner preserve the claim in his state court appeals merely by citing cases that coincidentally included discussions of retroactivity and fair notice. As the Magistrate Judge noted, those cases were cited for entirely different propositions. The boilerplate citation of federal due process cases does not constitute fair presentation such as to exhaust state remedies. *See Keeney* v. *Tamayo-Reyes*, 112 S. Ct. 1715, 1720 (1992) ("Exhaustion means more than notice," must be "serious and meaningful," and "is not satisfied by the mere statement of a federal claim in state court").

states to define and interpret their own criminal laws, and ignore principles of federal-state comity. "There is wide latitude in [state] lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." *Lambert* v. *California*, 355 U.S. 225, 228 (1957). This is particularly true of regulatory statutes enacted to achieve legitimate social ends pursuant to a state's police powers. *United States* v. *Freed*, 401 U.S. 601, 609 (1971); *United States* v. *Balint*, 258 U.S. 250, 252 (1921).

The Ohio Supreme Court held in *State* v. *Warner* that Ohio Rev. Code § 1707.29 is a definiton of "knowledge." Thus § 1707.29 describes an element of the underlying offense; it does not lessen the obligation of the State to prove that element beyond a reasonable doubt. The Court's substantive ruling is a statement of state law regarding the elements of a crime, not a statement of how a violation may be proved at trial:

> Under R.C. 1707.44(B)(4), (G), and (J), a person is criminally liable if he represents facts to be different than he should have known them to be if he had exercised reasonable diligence to ascertain the facts prior to the commission of the offense. (*State* v. *Walsh* [1979], 66 Ohio App. 2d 85, 95-96, 20 O.O.3d 178, 184-185, 420 N.E.2d 1013, 1020, applied and followed; R.C. 1707.29, construed.)

State v. *Warner*, syllabus 4.

As an interpretation of state law, the Ohio Supreme Court's holding is binding on habeas review. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle* v. *McGuire*, 112 S. Ct. 475, 480 (1991). *See also Winters* v. *New York*, 333 U.S. 507 (1948) (state court's interpretation obviously designed to cure constitutional defect accepted as "authoritative"). Hence a state court's interpretation must be followed even where it is argued that "it marks a radical departure from prior law,

leads to internally inconsistent results, and is a transparent effort to circumvent [*In re*] *Winship* [422 U.S. 510 (1979)]." *Mullaney* v. *Wilbur*, 421 U.S. 684, 690-91 (1975).

The Ohio Surpreme Court's holding distinguishes this case from the presumption cases, such as *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), *Francis* v. *Franklin*, 471 U.S. 307 (1985), and *Carella* v. *California*, 491 U.S. 263 (1989). In each of those cases the prosecution was relieved of a part of its burden of proof on an element of the crime. In Warner's case the prosecution still bore the entire burden to prove what Warner should have known in the exercise of reasonable diligence. The Ohio legislature has substantively defined an element of the crime, not altered the prosecution's burden of proving that element.

B. Habeas Relief Would Be Improper In Any Event, Given The Ohio Supreme Court's Harmless Error Analysis And The Jury's Finding That Petitioner Acted With A Purpose To Deceive.

Petitioner's *Sandstrom* argument is academic. The Ohio Supreme Court found that even if § 1707.29 had been a mandatory presumption it would have been harmless error because the evidence showed that Warner had actual knowledge. Indeed, the Court held that "no rational juror could find otherwise," and that "*Warner's actions were shown to be calculated and deceitful.*" *State* v. *Warner*, 564 N.E.2d at 43-44 (emphasis added). The Ohio Supreme Court's analysis satisfied the requirement of *Yates* v. *Evatt*, 111 S. Ct. 1884, 1893 (1991), that the presumption be "measured against other evidence considered by [the] jurors independently of the presumption." The Ohio Supreme Court's application of this constitutional principle is entitled to respect on habeas. *Sawyer* v. *Smith*, 497 U.S. 227 (1990).

Independent of the Ohio Supreme Court's harmless error analysis, but confirming the Court's conclusions, was the

jury's finding under one of the three securities counts that Warner acted *with a purpose to deceive*, which required a finding of specific intent. A purpose to deceive, as defined in the charge given to the jury, is logically impossible in the absence of actual knowledge. A jury's findings are entitled to considerable weight when assessing the effect of even an admittedly erroneous instruction. *See, e.g., Henderson* v. *Kibbe*, 431 U.S. 145, 156 (1977) (jury verdict indicated that omission of causation instruction did not prejudice defendant). In this instance the evidence presented to the jury and reviewed by the Ohio Supreme Court demonstrated that Warner's actual knowledge would have made any presumption superfluous.

III. PETITIONER HAS NO RIGHT TO AN EVIDENTIARY HEARING UNDER *TOWNSEND v. SAIN*.

The Petitioner's final claim is that the Court of Appeals does not understand *Townsend* v. *Sain*, 372 U.S. 293 (1963) and 28 U.S.C. § 2254(d). The argument is not that the court misstated the law, but rather that its opinion failed to specifically cite *Townsend*—a failure Warner evidently equates with ignorance of the law. It will be seen that *Townsend* was not quoted because it related to a tangential issue that is, for a variety of reasons, moot.

A. The Court of Appeals Did Not Address *Townsend* Because Petitioner Did Not Raise His Right To An Evidentiary Hearing As An Issue For Review.

Before addressing the merits of this claim, we should note that Warner did not raise his right to an evidentiary hearing as an issue for review in the Court of Appeals, and the court did not "affirm the denial of a hearing." The Court of Appeals only discussed the state evidentiary hearing as it related to the Respondent's harmless error argument, made in

response to Warner's claim that he was unfairly denied a copy of the written jury instructions.[3] Respondent pointed out that Warner was not prejudiced by his inaccess to the written instructions, because they were the same as the oral instructions. As an element of that argument, Respondent referred to the state court's correction of the record to reflect delivery of the four supplemental written instructions.

The Court of Appeals agreed with the Respondent's harmless error analysis, hence the language in its opinion about the propriety of the state court's evidentiary ruling. The Court of Appeals did not discuss *Townsend* because there was not really a *Townsend* issue before it. It is thus misleading for the Petitioner to argue that the Court of Appeals misapplied the law and denied him a hearing.

B. An Evidentiary Hearing Is Foreclosed By the District Court's Waiver and Harmless Error Holdings.

As already noted, the *Townsend* issue arises only as a remote sub-issue of Warner's primary claim that he was prejudiced by being denied access to written jury instructions. Although the Ohio Supreme Court agreed that he should have been shown the instructions before they went to the jury, the error was harmless because the written instructions did not vary from the oral instructions read in the defendants' presence. Warner's claim that the written supplemental instructions did not reach the jury was his effort to show a variance.

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[3] The question arises out of Petitioner's third issue stated for review in the Court of Appeals:

> Does a defendant in a state criminal case have a federal due process right to be informed of the contents of written instructions of the law given to the jury by the trial court?

There was no issue presented regarding Petitioner's right to an evidentiary hearing.

As the District Court observed, Warner's claim fails even if the supplemental instructions were not delivered.

> The alleged complete lack of written supplemental instructions . . . caused petitioner no prejudice because the trial court instructed the jury orally on these matters. Since the instructions taken as a whole contained these elements, the jury had before it the explanation petitioner sought and therefore no prejudice inured to petitioner's defense.

(Pet. App. A-22; citations omitted.) Hence an evidentiary hearing to determine whether or not the written instructions were delivered would be superfluous.

In any event, the District Court noted that Warner had waived any complaint about the manner in which the supplemental instructions were delivered because he did not object to—indeed, he actively participated in—the procedure used in the trial court. "Petitioner's failure to object to the trial court's procedure constitutes a procedural default, since he did not give the trial court the opportunity to invoke the procedure he, in restrospect, thinks should have been followed." (Pet. App. A-8.) Further review of Warner's complaints about the supplemental instructions would be a waste of time.

C. Petitioner Is Not Entitled To An Evidentiary Hearing Because He Had a Full And Fair Hearing In State Court.

Townsend requires that a habeas court conduct an evidentiary hearing "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Id.* at 312. There is no requirement that the hearing in the state court be conducted in a trial-like setting; the hearing requirement can even be satisfied by an appellate court's review of the record. *Sumner* v. *Mata*, 449 U.S. 539, 545-46 (1981).

Warner never argued in the state court that the procedure for resolving the motion to correct the record was unfair. He submitted his own affidavits and briefs, and was fully heard on the issues. The motion to correct the record arose after Warner argued in his state court appeal that the written jury instructions varied from the oral instructions. The principal basis for this claim was the contention that the four supplemental instructions must not have been delivered to the jury because they were not found in the chaos that followed the verdict. The State filed a motion in the trial court to correct the record pursuant to Ohio R. App. P. 9(E)—which is identical to Fed. R. App. P. 10(E).[4] The motion was supported by the affidavits of the court reporter who recalled typing the instructions at the behest of Warner's counsel, the court constable who recalled physically delivering the instructions to the jury, and the assistant special prosecutor who had been involved in the event and who authenticated copies of drafts of the supplemental written instructions maintained in his files.

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[4] The motion was delayed because Warner's appeal was severed, and the jury instruction issue was stayed while other issues were briefed.

Warner filed affidavits from two of his trial attorneys corroborating the meeting with the trial court and the preparation of the written instructions, but disavowing knowledge of delivery; and the affidavits of two jurors who did not remember seeing the supplemental instructions. One of Warner's attorneys included in his affidavit an account of conversations he allegedly had with the jury foreman, since deceased, and other jurors who did not submit affidavits.

The trial judge then sitting in Warner's case and the original trial judge (ruling on an identical motion as to a co-defendant) granted the motions to correct the record. The Ohio Supreme Court agreed that the evidence supported the motion to correct the record, but ruled the affidavits of the two jurors inadmissible under Ohio R. Evid. 606(B) and the hearsay statements in the attorney's affidavit inadmissible under Ohio R. Evid. 802.

The only complaint Warner can raise at this point is that the Ohio Supreme Court applied Ohio Rules of Evidence to the hearing. That hardly makes the hearing unfair under *Townsend*. If it did, evidentiary hearings would be required in every habeas case to determine whether or not the outcome in the state court would have been different under the Federal Rules of Evidence. Unless Warner could prove Ohio R. Evid. 606(B) itself unconstitutional—and it is too late for that argument—he cannot establish a flaw in his state hearing.

D. An Evidentiary Hearing Would Be Pointless Because Petitioner's Evidence Has Already Been Considered And Found Nonprobative.

Warner's problem was not just that his evidence was incompetent. Even if his evidence had been admissible, it proved nothing. Two trial judges—including the one original-

ly involved in the episode—considered Warner's evidence, but granted the motions anyway.

> In granting the state's motions to correct the record, the trial judges *considered all the affidavits, memoranda and arguments of counsel*. . . . There is nothing in the affidavits to directly contradict that the judge handed the instructions to the constable, who, in turn, placed them on the table in the jury deliberation room.

State v. *Schiebel*, 564 N.E.2d 54, 67 (Ohio 1990) (emphasis added).

It is easy to see why the juror affidavits were unpersuasive. The jurors said they did not remember seeing the supplemental instructions. As the Ohio Supreme Court observed, "[t]he issue here is not whether the jurors considered the supplemental instructions during their deliberations in reaching a verdict, but whether there was sufficient evidence presented to support the trial court's decision that the instructions were delivered. We believe there is." *Id.* The Court of Appeals felt likewise. (Pet. App. B-36.)

To the extent Warner was entitled to an evidentiary hearing in the state court, he received one. Had he received an evidentiary hearing before the court's below, the outcome would have been the same. The Magistrate Judge, District Court, and Court of Appeals all had Warner's evidence before them. As in *Summer* v. *Mata*, those courts could review the record and arrive at the same conclusion as did the state court. There is no basis for a further evidentiary hearing on this claim.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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